Supreme Court, U.S.
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In The

Supreme Court of The United States

October Term, 1993

GUISSEPPE DiFRANCO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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48 pp

QUESTIONS PRESENTED

1. Late on the afternoon of the last day of the prosecution case, petitioner's counsel requested an adjournment to the following morning in order to consult with petitioner and for petitioner to decide whether he would testify. Although the prosecutor had no objection to this request, the trial court denied it. Instead, the court gave petitioner only "five minutes" to decide whether he would testify. Petitioner did not testify.

The foregoing raises the following issues:

a) Whether giving petitioner five minutes to decide whether to testify deprived petitioner of his Constitutional rights to testify, to present his defense and/or to the effective assistance of counsel?

b) Whether the trial court failed to obtain a knowing, voluntary and

intelligent waiver of the above rights, particularly where petitioner did not personally waive them?

2. In addition to attacking the credibility of the testimony of the prosecution witnesses, defense counsel focussed on several gaps in that testimony as it related to the acts of petitioner purportedly constituting criminal activity. Accordingly, defense counsel expressly requested that the jury be instructed that a reasonable doubt could be based on the "lack" of evidence. The refusal of the trial court to so charge raises the question of whether the denial of that instruction deprived petitioner of a fair trial.

3. Petitioner was not sentenced until almost 14 months after the jury verdict. This raises the issue of whether that delay deprived petitioner of his Constitutional right to a speedy sentence.

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IN THE

SUPREME COURT OF THE UNITED STATES

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GUISSEPPE DiFRANCO,

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- against -

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PRELIMINARY STATEMENT

Petitioner, Guisseppe DiFranco, respectfully requests that a Writ of Certiorari be issued to review a judgment and opinion of the United States Court of Appeals for the Second Circuit entered in the above-captioned proceeding on December 2, 1993.

OPINION BELOW

There was no opinion in the United States District Court for the Eastern District of New York (Platt, Ch. J.). The opinion of the United States Court of Appeals for the Second Circuit affirming petitioner's conviction is unreported and is reprinted in the Appendix at p. 1a.

JURISDICTION & TIMELINESS

This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. §1254(1).

This petition is timely because filed within 90 days of the Court of Appeals' decision. Supreme Court Rule 13.1.

STATUTES & CONSTITUTIONAL PROVISIONS INVOLVED

United States' Constitution, Amendment V:

> "No person shall be ... compelled in any criminal case to be a witness against himself, nor be deprived of ... liberty ..., without due process of law .... "

United States' Constitution, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy ... trial, ... and ... to have compulsory process for obtaining witnesses in his favor, and to have the effective assistance of counsel for his defense."

Federal Rules of Criminal Procedure, Rule 32(a)(1):

> "Sentence shall be imposed without unnecessary delay .... "

STATEMENT OF THE CASE

Petitioner was charged with conspiracy to possess and distribute, and possession of, a controlled substance in violation of 21 U.S.C. §§841(a)(1) and

846. After a trial before Hon. Thomas Platt, Chief Judge of the United States District Court for the Eastern District of New York, and a jury, petitioner was convicted of both charges. He was sentenced to 151 months' imprisonment.

With one exception, all of the prosecution witnesses gave non-incriminating testimony of surveillance of petitioner; only one Khililullah Kakar directly implicated petitioner in any of the crimes charged. Kakar gave a portion of his testimony on the second day of trial (Trial Transcript - hereafter "TT." - 182-216), and the remainder — including extensive cross-examination — on the third day (TT. 217-71).

After the prosecution rested, and petitioner's motion for a judgment of acquittal was denied, it was quite late in the day. Defense counsel's request for an overnight adjournment to consult with

petitioner as to whether or not he would testify resulted in the following colloquy:

> "MR. DE PETRIS [defense counsel]: May we approach for a minute, Judge?
>
> (At the sidebar.)
>
> MR. DE PETRIS: Judge, my client is considering whether or not he wishes to testify in this case.
>
> THE COURT: You are going to have to make up your minds now.
>
> MR. DE PETRIS: I was going to request, since it's my understanding that the government had no objection --
>
> THE COURT: No, I have an objection. He will have to fish or cut bait. I am not going to wait two hours.
>
> MR. DE PETRIS: Could you give me, Your Honor, 15 minutes to --
>
> THE COURT: I will give you five minutes when we recess.
>
> MR. DE PETRIS: I am sorry?
>
> THE COURT: I'm giving you five minutes. Either get up or not get up.
>
> MR. DE PETRIS: All right.
>
> (End of sidebar.)
>
> (Recess taken.)
>
> MR. DE PETRIS: Mr. DiFranco has indicated that he does not wish to testify.
>
> THE COURT: Fine. Then you will have to rest in front of the jury.
>
> MR. DE PETRIS: I understand.
>
> THE COURT: As I have explained to you, I will not

> entertain any motion to reopen tomorrow.
>
> MR. DE PETRIS: I have explained to Mr. DiFranco that Your Honor said that he had to make his decision now.
>
> THE COURT: Yes. And that you should explain to him should he attempt to change his mind tomorrow, I will not entertain any such application." (Trial Transcript 344-5).

Accordingly, petitioner rested without testifying.

Because of the lateness of the hour, summations were put off until the following day and the jury was dismissed (TT. 346-8).

There followed a brief discussion of the court's proposed charge (TT. 348-51), after which the trial was adjourned to the following day (TT. 351).

On appeal, petitioner contended that giving counsel only five minutes to confer with his client and decide whether or not the client should give testimony deprived petitioner of his Constitutional rights to testify, to present a defense, and to the

effective assistance of counsel, particularly where there was no personal waiver of those rights. The Court of Appeals rejected that contention (8a-11a).

After the court had charged the jury, defense counsel objected and requested an instruction that a reasonable doubt could arise from the "lack of evidence"; the trial court refused to so charge (TT. 430-1). On appeal, the Court of Appeals upheld this refusal (11a-12a).

Petitioner was found guilty on March 31, 1992, but he was not sentenced until May 21, 1993 — a period of almost 14 months. On appeal, the Court of Appeals held that this delay did not deprive petitioner of his Constitutional right to a speedy sentence (12a-14a).

REASONS FOR GRANTING THE WRIT

POINT I

THE DECISION OF THE COURT OF APPEALS, UPHOLDING THE TRIAL COURT'S ACTION GIVING PETITIONER FIVE MINUTES TO DECIDE WHETHER TO TESTIFY, IS IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS, AND CONSTITUTES AN UNACCEPTABLE DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

In a series of decisions going back more than 30 years, this Court first suggested, then assumed, and finally held, that a defendant in a criminal case has a Federal Constitutional right to testify in his or her own behalf. Ferguson v. Georgia, 365 U.S. 570, 581-2, 602 (1961); Brooks v. Tennessee, 406 U.S. 605, 612 (1972); Jones v. Barnes, 463 U.S. 745, 751 (1983); Nix v. Whiteside, 475 U.S. 157, 164, 186, n. 5 (1985); Rock v. Arkansas, 483 U.S. 44 (1987). The bases of this right are the Fifth Amendment prohibition

against compelled testimony, the Sixth Amendment rights to call witnesses and present a defense, and the Fifth Amendment guarantee of due process of law. Id. at 51-3.

It is true that a trial court may put reasonable restrictions on the right to testify. See, e.g., Nix v. Whitehead, supra, 475 U.S. at 173 (no right to give false testimony); Cox v. Wyrick, 873 F.2d 200, 202 (8th Cir. 1989) (court may prohibit accused from testifying where accused deliberately refused to comply with prosecution discovery requests); United States v. Scott, 789 F.2d 795, 799 (9th Cir. 1986) (proper to set time limit of several hours on defendant's testimony, particularly where defendant made no proffer of additional testimony.

However, "restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the

purposes they are designed to serve." Rock v. Arkansas, supra, 483 U.S. at 55-6. And giving a defendant five minutes to make the most important decision of his life violates that prohibition. See, in general, Ungar v. Sarafite, 376 U.S. 575, 589 (1964) (condemning "a myopic insistence upon expeditiousness in the face of a justifiable request for delay"). See, also, United States v. Pruett, 788 F.2d 1395, 1396-8 (8th Cir. 1986) (denial of continuance to present defense testimony held reversible error); Bennett v. Scroggy, 793 F.2d 772, 774-7 (6th Cir. 1986) (denial of overnight adjournment to call defense witness held reversible error); Hicks v. Wainwright, 633 F.2d 1146, 1148-50 (5th Cir. 1981) (same).

Cf. United States v. Iorizzo, 786 F.2d 52, 59 (2d Cir. 1986) (no valid waiver of conflict of interest where accused had to decide whether to continue

with present counsel "on the spot"); United States v. Curcio, 680 F.2d 881, 889 (2d Cir. 1982) ("Further, the court's inquiry [re: conflict of interest] in each case should take place after the defendants have had a reasonable time to digest and contemplate the risks posed by joint representation. A reasonable time was not provided in the present case. The hearing, ... was held in less than an hour, squeezed into the luncheon break of a state grand jury").

The Court of Appeals rejected this argument for the following reasons:

> "Essentially, this argument amounts to a challenge to the district court's failure to grant a continuance. We review a trial court's decision not to grant a continuance for an abuse of discretion. See United States v. King, 762 F.2d 232, 235 (2d Cir. 1985), cert. denied, 475 U.S. 1018 (1986). Given that DiFranco had several days of trial to consider whether to testify, and that there were no surprises requiring an extended time for DiFranco to contemplate his

defense strategy, the trial court's determination concerning how much additional time DiFranco needed to decide whether to testify was not an abuse of discretion." (9a-10a)

The defects in the foregoing are many and varied.

Initially, it must be noted that by denominating this issue as one involving "a challenge to the district court's failure to grant a continuance" the Court of Appeals denigrated and distorted the nature of petitioner's claim. That claim was that giving him five minutes to decide whether to exercise a Constitutional right is a deprivation of that right as a matter of law. The trial court did not have to grant petitioner the overnight continuance that defense counsel originally requested, so long as the court did give petitioner and his counsel a reasonable amount of time to decide whether to testify. And five minutes was simply an unreasonable amount of time.

Next, the Court of Appeals asserted as "[g]iven" that petitioner "had several days of trial to consider whether to testify" and that "there were no surprises requiring an extended time for [petitioner] to contemplate his defense strategy," and the Court therefore concluded that the trial court properly determined "how much additional time [petitioner] needed to decide whether to testify."

In the first place, it has always been petitioner's position that he was innocent; accordingly, Kakar's testimony incriminating him did come as a surprise.

In the second place, there is no requirement that a defendant be "surprised" by the testimony against him in order to be entitled to a reasonable period of time, i.e., longer than five minutes, to decide whether or not to

testify.[1]

In the third place, although, as an abstract matter, petitioner may have "had" the two previous days of trial "to consider" whether to testify, the record contains no support for the assertion that that matter was, in fact, ever discussed by petitioner and his counsel.[2]

---

[1] Or, in fact, to make any other decision of Constitutional significance.

In this regard it must be noted that in United States v. Iorizzo, supra, the sole case cited by the Court of Appeals to uphold the trial court's action (10a), the defendant had been aware of the potential conflict of interest long before the time when he had to decide whether or not to waive it, but that fact was never even discussed by the Court in holding the waiver invalid. See, also, United States v. Curcio, supra (same).

[2] It must be noted that defense counsel only received the "3500" material from the prosecution late on the night before the trial began, and that he spent that evening reviewing that material (TT. 2). The time spent in court was, of course, occupied with the receipt of direct testimony (which defense counsel had to listen to carefully) and by cross-examination by that counsel. Moreover, counsel was ill throughout the trial; the trial was adjourned early on the first day

(continued...)

Moreover, that two days of trial preceded the time petitioner requested time to decide whether or not to testify is largely irrelevant.

The crucial factor in determining whether or not petitioner would testify was an assessment of the testimony of Kakar - in particular, an assessment of the effect of Kakar's cross-examination on Kakar's direct testimony. Since Kakar's cross-examination had only finished shortly before the request for a continuance, it is clear that neither petitioner nor his counsel had any time in which to make that assessment.

In addition, every practitioner of criminal law knows that the decision

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[2](...continued)
so that counsel could see his doctor, and on the second day because counsel was still sick (TT. 2, 10, 153-4, 209-10).

Accordingly, defense counsel and petitioner were unable to use any time either in, or out of, court to discuss this crucial matter.

whether or not the defendant will testify is not made until after the prosecution rests. See, e.g., 1 CIPES, Criminal Defense Techniques, §1A.07 at p. 1A-7 (Bender, 1991) ("This decision is often the most difficult of the case, and should not be finalized until you have heard all the evidence and carefully evaluated [it]"); 1 AMSTERDAM, Trial Manual for the Defense of Criminal Cases, §349 at p. 1-470 (ALI-ABA, 1984) (counsel should wait until prosecution has rested to decide whether or not defendant will testify); 2 AMSTERDAM, Trial Manual for the Defense of Criminal Cases, §§388 and 390 at pp. 1-523 and 1- 525-9 ("The decision whether to put the defendant on the stand is a crucial one .... After the court has ruled adversely on the defense motion for a directed verdict, counsel is forced to the decision at last ... "; Manual lists 11 factors for counsel and the defendant to

discuss and consider before making this decision).

Cf. Brooks v. Tennessee, supra, 406 U.S. at 608-11 (since a defendant's decision to testify will not be made until after all other witnesses have testified, and their testimony has been "realistically assessed," State rule requiring defendant to testify first is unconstitutional burden on defendant's right to testify).

Once a deprivation of the right to testify has been found, harmless error analysis is inapplicable and there must be a new trial. Biller v. Lopes, 834 F.2d 44, 46 (2d Cir. 1987).

Moreover, any test of prejudice would clearly be satisfied in this case.

A leading authority in the area of criminal defense techniques has unequivocally stated that "It seems increasingly important in criminal cases

to have the client testify." 1 CIPES, supra, at p. 1A-7. This is so, in general, because "It is widely agreed among criminal lawyers of experience that the defendant's failure to take the stand will be construed by the fact-finder as an indication that the defendant is hiding something - hence that s/he has something to hide." 2 AMSTERDAM, supra, at p. 1-525. Moreover, where, as here, only petitioner could give testimony on certain crucial issues, e.g., what really said when petitioner and Kakar were in petitioner's house and car, and spoke on the telephone, petitioner's testimony is even more important. See, e.g., Rock v. Arkansas, supra, 483 U.S. at 52 ("In fact, the most important witness for the defense in many criminal cases is the defendant himself .... [F]undamental to a personal defense ... is an accused's right to present his own version of events in his

own words. A defendant's opportunity to conduct his own defense by calling witnesses is incomplete if he may not present himself as a witness").

The Court of Appeals held that petitioner had made a knowing, intelligent and voluntary waiver of his right to testify "for the same reasons" it found no error in the denial of the continuance (10a - 11a). Since petitioner has demonstrated the invalidity of those reasons re: the continuance issue, they also do not support the finding of waiver.

One last point must be made.

The right to testify is personal to the defendant; therefore, the waiver of that right must be made personally by the defendant. Jones v. Barnes, 463 U.S. 745, 751 (1983) (citing Wainwright v. Sykes, 433 U.S. 72, 93 n. 1 [1977]). See, also, The Legacy of Rock v. Arkansas: Protecting Criminal Defendants' Right to

Testify in Their Own Behalf, 19 New England Journal on Criminal & Civil Confinement 223, 224 (1993): "Because the right to testify is a fundamental constitutional guarantee, only the defendant is empowered to waive the right." Since that was not done here, the waiver is also defective for that reason. See, e.g., Nichols v. Butler, 917 F.2d 518, 521 (11th Cir. 1990) (right to testify "cannot be forfeited by counsel, but only by a ... waiver by the defendant himself.")

Five minutes was simply insufficient time for petitioner and his attorney "to digest and contemplate" the prosecution case, especially Kakar's lengthy and recent testimony, and to decide whether or not to testify. As was said in United States v. Curcio, supra, 680 F.2d at 890:

> "If a reasonable time is not allowed to the defendant [to

> decide whether or not to waive a Constitutional right], both the opportunity for the defendant to make a knowing and intelligent decision, and the opportunity for the court to assess correctly whether such a decision has been made, are minimized."

In sum, and whether denominated an abuse of discretion for failing to grant a reasonable adjournment, the failure to obtain a personal, knowing and voluntary waiver of the right to testify, or the denial of the right to the effective assistance of counsel and to present a defense, giving petitioner only five minutes to decide whether to testify deprived him of his Constitutional rights. Accordingly, the writ should issue. Supreme Court Rule 10.1(a).

POINT II

THE DECISION OF THE COURT OF APPEALS, UPHOLDING THE REFUSAL OF THE TRIAL COURT TO INSTRUCT THE JURY THAT A REASONABLE DOUBT MAY ARISE FROM A "LACK OF EVIDENCE," IS IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS.

The Court of Appeals for the Second Circuit rejected petitioner's contention that the trial court erred when it refused to charge that a reasonable doubt could arise from a "lack of evidence," citing Leecan v. Lopes, 893 F.2d 1434, 1443 (2d Cir. 1990) and United States v. Caruso, 358 F.2d 184, 186-7 (2d Cir. 1966) (8a). It is true that those cases uphold the right of a trial court to refuse to charge as requested here. However, it is also true that those cases are in conflict with decisions of this Court and other Courts of Appeals.

In Jackson v. Virginia, 443 U.S. 307, 317, n. 9 (1979) this Court held that "A

'reasonable doubt' has been described as one 'based on reason which arises from the evidence or lack of evidence'." In Johnson v. Louisiana, 406 U.S. 356, 360 (1972) the Court held that "Numerous cases have defined a reasonable doubt as one 'based on reason which arises from the evidence or lack of evidence' (citations omitted). In In re Winship, [397 U.S. 358 (1970)], the Court recognized this evidentiary standard .... " The standard instruction in the Seventh Circuit includes this language, see, e.g., United States v. Hall, 854 F.2d 1036, 1037 n. 2 (7th Cir. 1988) as does the standard charge in the First Circuit. See, e.g., United States v. Munson, 819 F.2d 337, 345 (1st Cir. 1987). Moreover, both the Sixth and Ninth Circuits require this language in their pattern instructions. See Sixth Circuit Pattern Criminal Jury Instructions, §1.03(4) ("A reasonable

doubt ... may arise from the evidence, the lack of evidence, or the nature of the evidence"); Modern Criminal Jury Instructions for the Ninth Circuit, §3.03 ("A reasonable doubt ... may arise from a careful and impartial consideration of all the evidence, or from lack of evidence").[3]

Certiorari should be granted to resolve this conflict. See Supreme Court Rule 10.1(a), (c).

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[3] In addition to these conflicts on the Federal level, the decision of the Court of Appeals is also in conflict with that of at least one of the States over which it has jurisdiction. See, e.g., People v. Travis, 134 A.D.2d 868, 869 (4th Dept. 1987) ("The court also erred in refusing defendant's request to charge the jury that reasonable doubt could be found in a lack of evidence"). See, also, People v. Mosley, 67 N.Y.2d 985, 987 (1986) and People v. Malloy, 55 N.Y.2d 295, 300 (1982), both of which decisions approved instructions containing "lack of evidence" language.

POINT III

THIS CASE PRESENTS THIS COURT WITH THE OPPORTUNITY TO DECIDE THE ISSUE "ASSUME[D] ARGUENDO" IN POLLARD V. UNITED STATES, 352 U.S. 354 (1957), AND TO RESOLVE THE CONFLICT BETWEEN THE DECISION OF THE SEVERAL COURTS OF APPEALS, REGARDING THE EXISTENCE AND DETERMINATION OF A RIGHT TO SPEEDY SENTENCE.

In Pollard v. United States, supra, 352 U.S. at 361, this Court stated: "We will assume arguendo that sentence is part of the trial for purposes of the Sixth Amendment [right to speedy trial]." See, also, id. at 368 (Warren, Ch. J., dissenting) ("it is not necessary to decide this issue on constitutional grounds"). However, since the Court went on to find no speedy trial and/or sentence violation, this assumption became academic.

The Court also referred to the requirement of sentence "without unreasonable delay" contained in Rule

32(a) of the Federal Rules of Criminal Procedure (id. at 361), but did not explore the interrelationship of that Rule and the Sixth Amendment.

This Court has never revisited these issues nor formally held that sentence is a part of a trial and/or that there is a Constitutional right to a speedy appeal and/or what are the standards for determining if that right (whether statutory and/or Constitutional) has been violated. This case presents this Court with the opportunity, and necessity, to decide these important questions. Supreme Court Rules, §10.1(c).

This case also presents this Court with an opportunity to resolve a conflict among the Courts of Appeals that have considered the latter of these matters.

All of the Courts of Appeals that have considered the issue have adopted the four-part test of Barker v. Wingo, 407

U.S. 514 (1972) in determining whether the right to a speedy trial has been violated, i.e., the length of the delay, the reason for the delay, whether a demand for sentence was made, and prejudice. However, the decision of the Second Circuit in this case is in conflict with the decisions of several other Circuits on three of the four parts of the test.[4]

In Perez v. Sullivan, 793 F.2d 249, 255 (10th Cir. 1986), the 10th Circuit held that a 15-month delay in sentencing mitigates in favor of a finding of a violation of the right to a speedy appeal, whereas in the instant case (and without any explanation or attempt to distinguish Perez), the Second Circuit found a 14-month delay permissible (13a).

In Burkette v. Fulcomer, 951 F.2d

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[4] All Circuits hold that the failure to demand prompt sentence militates against one later claiming the denial of the right to a speedy trial.

1431, 1440 (3d Cir. 1991) the Third Circuit held that delay which "falls into a non-intentional, but negligent area" is delay "for which the government must assume responsibility." The Second Circuit ruled that only "intentional" delay implicated the right to speedy sentence (13a-14a), and ignored the fact that the reason for the delay in this case was either willful indifference or unconscionable neglect on the part of the trial court.[5]

In Burkette, supra, 951 F.2d at 1441-5, the Third Circuit ruled that prejudice was demonstrated from one or more of the following: (a) languishing in prison without knowing how long one would have to be incarcerated; (b) being deprived of any opportunity to engage in rehabilitative

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[5] E.g., failing to even set a "control date" for sentence after conviction and remand of petitioner.

(or any other type of) programming;[6] and/or, (c) having the right to present a defense at any re-trial diminished by the passage of time. In the instant case, the Second Circuit summarily concluded these indicia of prejudice were "weak" (14a).

The foregoing demonstrates that the Second Circuit is in conflict with at least the Third and Tenth Circuits.[7] Accordingly, certiorari should be granted to resolve these conflicts. Supreme Court Rule 10.1(a).

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[6] An unsentenced federal prisoner is ineligible for programs of any kind, and typically spends 23 hours a day "locked down" in a cell.

[7] See, also, People v. Doceti, N.Y.L.J. 8/27/93, p. 25, col. 5 (S.Ct., Q.Co.) (n.o.r.) (13-month delay in sentence resulted in deprivation of right to speedy sentence).

CONCLUSION

FOR THE ABOVE-STATED REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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APPENDIX

APPENDIX a

OPINION OF
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit held at the United States Courthouse in the City of New York, on the 2nd day of December, one thousand nine hundred and ninety-three.

PRESENT:

HON. WILLIAM H. TIMBERS,
HON. THOMAS J. MESKILL,
HON. FRANK X. ALTIMARI,
. . . . . .
Circuit Judges,

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UNITED STATES OF AMERICA,

. . . . . .
Appellee,

-v- . . . . . .

93-1410

KHILILULLAH KAKAR,

Defendant,

GUISSEPPE DiFRANCO,

Defendant-Appellant.

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Appeal from the United States District Court for the Eastern District of New York.

This cause came to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of the district court be and it hereby is AFFIRMED.

Defendant-appellant Guisseppe DiFranco appeals from a judgment entered in the United States District Court for the Eastern District of New York (Platt, C.J.), convicting him, following a jury trial, of conspiracy to distribute and possess with intent to distribute heroin, in violation of 21 U.S.C. §846, and of possession of heroin with intent to

distribute, in violation of 21 U.S.C. §841(a)(1). DiFranco was sentenced to 151 months' imprisonment, five years supervised release, and a $100 special assessment.

At trial, the government relied principally on the testimony of Khililullah Kakar, who testified under a plea and cooperation agreement. Kakar essentially testified that after becoming involved in a plan to smuggle heroin from Pakistan to the United States, he contacted DiFranco, a long time friend, to see if he wanted to purchase the heroin. After DiFranco agreed to become the buyer, Kakar arranged various meetings with the drug suppliers, two Drug Enforcement Administration ("DEA") informants, in order to arrange the details of the drug deal. The government's evidence at trial also consisted of DEA surveillance of Kakar's meetings with the drug suppliers,

and DiFranco's meetings with Kakar.

After the government had presented its evidence and rested, defense counsel requested the remainder of the day for DiFranco to decide whether to testify. The court denied the continuance and counsel then requested a fifteen-minute recess to speak with DiFranco. The court denied this request and gave counsel five minutes to decide. DiFranco decided not to testify.

On appeal, DiFranco first contends that there was insufficient evidence from which the jury could find him guilty. To succeed on such a claim, DiFranco must "demonstrate that there was no evidence from which a reasonable mind might fairly conclude guilt beyond a reasonable doubt." United States v. Strauss, 999 F.2d 692, 696 (2d Cir. 1993) (citations omitted). "An appellant challenging the sufficiency of the evidence bears a very heavy

burden." United States v. Torres, 901 F.2d 205, 216 (2d Cir.) (citations omitted), cert. denied, 498 U.S. 906 (1990). We find that DiFranco has failed to meet this burden. Kakar's testimony concerning DiFranco's involvement in the heroin sale clearly supports a jury finding of guilt. Although DiFranco challenges the credibility of Kakar's testimony, such credibility determinations are issues for the jury to decide. See Strauss, 999 F.2d at 696 (noting that the jury is "exclusively responsible for determining a witness' credibility"). Additionally, the fact that there may have been limited corroboration of Kakar's testimony goes only to the weight of the evidence, ,not to its sufficiency. See United States v. Roman, 870 F.2d 65, 71 (2d Cir.). "The weight is a matter for argument to the jury, not a ground for reversal on appeal." Id.

DiFranco next contends that by refusing to grant him longer than five minutes to decide whether to testify, the district court improperly restricted his right to testify. Essentially, this argument amounts to a challenge to the district court's failure to grant a continuance. We review a trial court's decision not to grant a continuance for an abuse of discretion. See United States v. King, 762 F.2d 232, 235 (2d Cir. 1985), cert. denied, 475 U.S. 1018 (1986). Given that DiFranco had several days of trial to consider whether to testify, and that there were no surprises requiring an extended time for DiFranco to contemplate his defense strategy, the trial court's determination concerning how much additional time DiFranco needed to decide whether to testify was not an abuse of discretion. Cf. United States v. Iorizzo, 786 F.2d 52, 59 (2d Cir. 1986) (noting

that before a defendant can be found to have waived counsel's conflict of interest, the defendant must be given time to "digest and contemplate the risks after encouraging him or her to seek advice from independent counsel"). For the same reasons, we also reject DiFranco's alternative claim that the district court erred by failing to obtain a knowing, intelligent, and voluntary waiver of his right to testify.

DiFranco next challenges the district court's instruction with regard to reasonable doubt. DiFranco claims that the district court erred by not charging that a reasonable doubt may arise from a "lack of evidence." This contention is without merit. A trial court is not required to charge that a reasonable doubt may arise from "a lack of evidence" or "want of evidence." See Leecan v. Lopes, 893 F.2d 1434, 1443 (2d Cir.) cert.

denied, 496 U.S. 929 (1990); United States v. Caruso, 358 F.2d 184, 186-87 (2d Cir.), cert. denied, 385 U.S. 862 (1966). DiFranco's final contention concerns his sentence. He claims that the almost fourteen-month delay between his conviction and sentencing constituted a violation of his constitutional right to the speedy imposition of sentence, which deprived the district court of jurisdiction to sentence him. The Court considers four factors in evaluating a speedy trial claim regarding sentencing: "length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." Barker v. Wingo, 407 U.S. 514, 530 (1972); see also United States v. Tortorello, 391 F.2d 587, 589 (2d Cir. 1968). Regarding the length of the delay, this Court has found longer periods not to have violated a defendant's right to a speedy trial.

See e.g., Tortorello, 391 F.2d at 589 (finding 29-month delay between conviction and sentencing not excessive). Furthermore, DiFranco has made no showing that the delay was intentional, nor did he assert his right to speedy sentencing below. Finally, DiFranco's claims of prejudice are weak. Accordingly, a balancing of the factors leads us to reject DiFranco's contentions.

We have examined all of DiFranco's contentions on appeal and have found them to be without merit.

AFFIRMED.

/s/
HON. WILLIAM H. TIMBERS,

/s/
HON. THOMAS J. MESKILL,

/s/
HON. FRANK X. ALTIMARI,

Circuit Judges.